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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR, and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles; THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION.

The respondents oppose the issuance of a writ of certiorari in this cause for the reasons that no constitutional question is presented and that in any event the decision below was clearly correct and does not conflict with any decision of this Honorable Court.

Statement of the Case.

Prior to January 6, 1949, each of the petitioners had occupied a position in the classified service of the City of Los Angeles [R. 2]. The City of Los Angeles is a municipal corporation of the State of California, organized under a freeholders' charter pursuant to Section 8 of Article XI of the Constitution of the State of California (Stats. of Calif., 1925, p. 1028).

Under the provisions of Sections 1-8 of Ordinance No. 94,004 [R. 11-13], each of the City's employees was required before January 6, 1949, to take and subscribe to an oath of allegiance to the United States and to the State of California, and to file an affidavit as to whether or not he was or had ever been a member of the Communist Party of the United States of America or of the Communist Political Association.

The oath of allegiance is in the usual form, and further includes definitive asseverations denying overt advocacies and affiliations inconsistent with the primary portion of the oath [R. 11, 12]. In addition to this undertaking of present allegiance, the oath includes a declaration as to the employee's conduct during the preceding five-year period. This portion of the oath was deemed to furnish additional security to the people of the City by seeking to insure that none of their employees had been engaged within that recent period in felonious conduct forbidden by the Smith Act (United States Code, Title 18, Section 2385) and by the California Syndicalism

and Sabotage Law (Deering's General Laws, Act 8428, Statutes of California, 1919, page 281), and was further indicated by the provisions of Section 432 of the Charter of the City of Los Angeles (Statutes of California, 1941, page 3409). That charter section provides as follows:

> "Notwithstanding any other provision of this charter, no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive, who has within five (5) years prior to the effective date of this section advised, advocated or taught, or who may, after this section becomes effective, advise, advocate or teach, or who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the government of the United States of America or of the State of California.
>
> "In so far as this section may be held by any court of competent jurisdiction not to be self-executing, the City Council is hereby given power and authority to adopt appropriate legislation for the purpose of effectuating the objects hereof."

Fifteen of the petitioners refused to sign either the oath or the affidavit; two of them, *Pacifico* and *Schwartz*,

signed the oath but not the affidavit, and thereafter all of them were discharged by the general managers of their respective departments [Charter of the City of Los Angeles, Sec. 80, Stats. of California, 1925, p. 1058, pertinent portions appear in Appendix "A"; R. 23.]

Section 112(a) of the Charter of the City of Los Angeles (Stats. of California, 1945, page 3102, set forth at length in Appendix "B" hereto) provides that an employee who has served his probationary period in the classified service of the City may be discharged only for a cause stated, and that he is entitled upon his application to a hearing by the City's Board of Civil Service Commissioners as to the sufficiency and truth of such stated cause. When it appears that there has been a full compliance with such a requirement and that the reviewing board has denied reinstatement in the exercise of its jurisdiction, the discharge is effectual and is not subject further to judicial review. (*Ex parte Secombe,* 19 How. 9, 15 L. Ed. 565; *Nunes v. Bd. of Civ. Serv. Commissioners,* 88 Cal. App. 2d 632, 637 [199 P. 2d 311]; *Brown v. Board of Police Commissioners,* 2 Cal. App. 2d 245, 251 [37 P. 2d 737]; *McGinn v. Dept. of Health of San Francisco,* 113 Cal. App. 228, 231 [298 Pac. 118]; *Boyd v. Pendegast,* 57 Cal. App. 504, 507 [207 Pac. 713]; *State ex rel. Beebe v. City of Seattle,* 159 Wash. 392 [293 Pac. 459].). (This is also the rule in the federal courts [*Myers v. U. S.,* 272 U. S. 52, 71 L. Ed. 160; *Eberlin v. U. S.,* 257 U. S. 82, 66 L. Ed. 140; *Carter v. Forrestal,* 175 F. 2d 364].)

Upon his application, the cause of the discharge of each petitioner was reviewed by the Board of Civil Service Commissioners in an open and public hearing. Each of the petitioners was present at his hearing, each was represented by counsel, and each was afforded every opportunity to present evidence and argument to the Commision [R. 5, 6, 25, 26]. After taking the matter under submission the Commission in each case entered its determination that the causes stated for the discharge were true, and that the causes stated were sufficient to sustain the discharge [R. 5, 6, 25, 26].

Issues Presented in State Court.

By their consolidated application to the Superior Court of the State of California in and for the County of Los Angeles, the petitioners sought a writ of mandate compelling their reinstatement to the positions from which they had been discharged [R. 1-10]. This petition did not bring up the record before the Civil Service Commission, nor seek its review. Thus no issues were presented to the Superior Court as to the truth of the charges, as to the sufficiency of the evidence to support the Commission's determinations, or as to the regularity of the discharges or of the procedure before the Commission. It is clear, therefore, that the petition was rested upon the single proposition that the causes stated for the petitioners' discharges were entirely insufficient, as a matter of law [R. 1 to 27].

Issues Presented on Certiorari.

It follows that the only questions presented here are these:

1. Is a federal question presented where a state court refuses to mandate a municipal corporation to reinstate a discharged employee upon the claim that the cause stated for the employee's discharge was insufficient as a matter of law?

2. Assuming that a federal question is presented is it sufficient cause for the discharge of a city employee:

(a) That he refused to take an oath of allegiance to the United States and to the State?

(b) That he refused to assert his past loyalty for a five year period?

(c) That he refused to state whether or not he had been a member of certain named organizations, where the city's legislative body had determined such information to be relevant to his employment?

Opinions Below.

Upon the petitioners' appeal to the District Court of Appeal of the State of California, Second Appellate District, the judgment of the Superior Court was affirmed in an opinion reported in 98 Advance California Appellate Reports, at page 694 [220 P. 2d 958], and appearing in the printed record at pages 40-46. Under California law the decision of the District Court of Appeal is merely an affirmation of the judgment of the Superior

Court, does not supersede that judgment, and is not itself the judgment in the case.

People v. Skidmore, 27 Cal. 287, 293;

Howard v. Howard, 87 Cal. App. 20, 26 [261 Pac. 714];

Peoples Home Sav. Bank v. Sadler, 1 Cal. App. 189, 194 [81 Pac. 1029].

Nor does the opinion of the District Court of Appeal rest on any conclusion as to the petitioners' asserted federal rights.

The petitioners' request for a hearing by the Supreme Court of California was denied by that court without opinion [R. 47].

Jurisdiction.

By statements of mere conclusions, the petitioners attempted to raise questions under the Constitution of the United States in the trial court and upon appeal [R. 7-9, 38-39], but in fact no such issues were presented by the *facts* alleged in the original petition to the Superior Court. The selection, appointment and tenure of appointed personnel in the service of the states or their political subdivisions, or in the service of municipal corporations deriving their powers from the states, are matters reserved entirely to the states. (*Kotch v. River Port Pilot Comm'rs,* 330 U. S. 552, 91 L. Ed. 1093; *Re Summers,*

325 U. S. 561, 570, 89 L. Ed. 1795, 1802; *Heim v. McCall*, 239 U. S. 175, 191, 60 L. Ed. 206, 216.)

There is no constitutional right to public employment in the State of California, and the termination of public employment under the State of California raises no constitutional question. (*Risley v. Board of Civil Service Commissioners*, 60 Cal. App. 2d 32, 38 [140 P. 2d 167]; *Ludolph v. Board of Police Commissioners*, 30 Cal. App. 2d 211, 216 [86 P. 2d 118].)

Since the matter involved is one reserved peculiarly to state action, since the administrative remedy provided is exclusive, and since no federal right in petitioners was touched, no constitutional question is presented. The petitioners cite no case, and we have found none, where any federal court has directed the reinstatement of a discharged state or municipal employee, either on the ground that his discharge was forbidden by the Constitution of the United States or on any other ground. On the contrary, each effort to secure federal intervention in such cases has been rejected, so far as we have been able to ascertain.

Redding v. City of Los Angeles, 81 Cal. App. 2d 888 [185 P. 2d 430] (appeal dismissed, 334 U. S. 825, 92 L. Ed. 1754);

Horosko v. Sch. Dist. of Mt. Pleasant, 335 Pa. 369 [6 A. 2d 866] (certiorari denied, 308 U. S. 553, 84 L. Ed. 465];

Brown v. Sch. Dist. of City of Bethlehem, 347 Pa. 418 [32 A. 2d 565] (certiorari denied, 320 U. S. 782, 88 L. Ed. 469);

City of Jackson v. McLeod, 199 Miss. 676 [24 So. 2d 319] (certiorari denied, 328 U. S. 863, 90 L. Ed. 1633);

Joyce v. Board of Education of City of Chicago, 325 Ill. 543 [60 N. E. 2d 431] (certiorari denied, 327 U. S. 786, 90 L. Ed. 1013).

In the *Joyce* case a teacher's discharge was sustained by the Appellate Court of Illinois. The prime cause stated was that she had applauded a draft law violation by a former pupil, and the determination of the school board that this was a sufficient cause was sustained by the court.

State of Indiana ex rel. Dorothy Anderson v. Harry Brand, 303 U. S. 95, 82 L. Ed. 685, involved a repeal of a tenure law rather than a discharge for cause and the decision of the Indiana Supreme Court was reversed, because, according to the majority opinion [Justice Black dissenting], there had been an impairment of contract. No claim of impairment is or could be made here, even if the petitioners had been tenured teachers. (*Phelps v. Prussia,* 60 Cal. App. 2d 732, 743-5 [141 P. 2d 440].)

Statutes Involved.

The case below arose out of Sections 80 and 112(a) of the Los Angeles Charter (Appendices "A" and "B"), and Sections 1-8 of the City's Ordinance No. 94,004 [R. 11-13].

The ordinance is connected with, although it does not depend upon, Section 432 of the Charter of the City of Los Angeles (Stats. of California, 1941, page 3409), which is set forth at length herein in our statement of the case, *supra*. (Since the enactment of this ordinance, the Legislature of the State of California has required that a similar oath be taken by all public employees [Chapter 8, Div. 4, Title 1, Government Code of California, Appendix "C"].)

The relevancy of the declarations required to be made in the oath provided in Section 1 of the Ordinance is supported by the California Syndicalism and Sabotage Law (Deering Act 8428, Stats. of California, 1919, page 281; sustained in *Whitney v. California*, 274 U. S. 357, 71 L. Ed. 1095), and by the California Subversive Organization Registration Law, first enacted in 1941 and now contained in the Corporations Code of California, Sections 35000 to 35302 (Stats. of California, 1947, Chapter 1038). The California Syndicalism and Sabotage Law is set forth at length in Appendix "D," and Sections 35000 to 35002, portions of Section 35100, Section 35103 and Section 35302 of the Corporations Code are supplied in Appendix "E." The relevancy of the requirements of the oath is also supported by the provisions of Sections 2381-2386 of Title 18 of the United States Code.

Questions Presented.

As heretofore pointed out, the only question presented to the Superior Court by the petitioners' application for mandate was solely a state question of whether or not there were sufficient causes stated for the petitioners' discharges under Section 112(a) of the City Charter (see Appendix "B").

This question presents no problem under the Federal Constitution. The questions presented by the facts alleged in the petition for mandate are not such as may be made the basis for the contentions attempted to be urged in the petition for certiorari. This is clearly so, since Sections 1-8 of Ordinance No. 94,004 carry no criminal sanctions, do not undertake on their face or as applied here to prohibit, regulate or restrict any of the liberties secured by the First or Fourteenth Amendments to the Constitution, and do not touch any person's rights or privileges to a hearing or determination under Section 112(a) of the City Charter.

Summary of Argument.

We are concerned here only with the power of the people of the City of Los Angeles to require that their own employees be loyal to their service and that they show a consistent record of loyalty for five years past.

Ordinance No. 94,004 requires only a showing of qualifications which are obviously requisite to be possessed by employees discharging a public trust. No more funda-

mental qualification could be asserted than that a public employee be dedicated to the support of the constitutional government of the United States. Such dedication, "loyalty," "allegiance," and other definitive expressions necessarily connote lawful conduct, and consequently the definitive provisions of the oath provided by Ordinance No. 94,004 require no more of the employee than such a short declaration as that required of the President by Section 8 of Article II of the Constitution. The relationship between the proper discharge of the duties of a public trust and the qualifications sought by an oath of allegiance is obvious: it is arrogant nonsense to argue, as the petitioners do in effect, that there is a constitutional right to work for the violent overthrow of the government established by the Constitution, and it is still more absurd to contend, as the petitioners do in effect, that one has an enforcible right to occupy a position of public trust and at the same time a protected right or privilege to scheme, conspire and work for the forcible overthrow of the government. To assert the deprivation, in such wise, of any First Amendment liberty is to contend that the First Amendment protects the advocacy of sabotage, terror and murder, that the First Amendment protects assemblages which purpose the overthrow of the government, and that the First Amendment prohibits any undertaking by the people of this country to defend their established constitutional government against internal conspiracies to effect its destruction.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

A. Basis of Judgment.

The judgment of the Superior Court determined that the petitioners had stated no cause of action to compel their reinstatement to their former positions in the public service. The petition did not set forth or attack the evidence which was presented before the Civil Service Commission during the extended hearings which preceded the Commission's orders sustaining the petitioners' discharges; consequently that evidence could not be reviewed by the state court and may not be reviewed here. Absent the record before the Civil Service Commission, it must be assumed that no substantial evidence was presented to impeach the petitioners' discharges, and in support of the Commission's determinations, it must be assumed that the evidence fully supported them.

California Code of Civil Procedure, Section 1963(15);

Swars v. Council of City of Vallejo (1949), 33 Cal. 2d 867, 872 (206 P. 2d 355);

Lindell Co. v. Board of Permit Appeals of San Francisco (1943), 23 Cal. 2d 303, 323 (144 P. 2d 4, 15);

Cantrell v. Board of Supervisors, 87 Cal. App. 2d 471, 479 (197 P. 2d 218);

Northside, etc., Ass'n v. County of Los Angeles (1945), 70 Cal. App. 2d 598, 608 (161 P. 2d 613).

The petitioners launch an attack upon Sections 9 through 23 of the ordinance [Pet. pp. 12, 20-21; R. pp. 13-18]. Since none of those sections was involved in the cases of any of the petitioners, no question arising out of them was presented to the Civil Service Commission or to the state court, and none can be presented here.

Henneford v. Silas Mason Co., 300 U. S. 577, 583, 81 L. Ed. 814, 819;

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 22, 76 L. Ed. 136, 145;

Whitney v. California, 274 U. S. 357, 362, 71 L. Ed. 1095, 1100.

So far as the attack upon Section 4 of the ordinance is concerned, no showing by the petitioners appears as to the nature or character of the Communist Party of the United States of America or of the Communist Political Association. Consequently, in supporting the determination of the legislative body as to the relevancy of inquiries about those organizations, and in support of the determinations of the Civil Service Commission on that issue, which was narrowly presented in the cases of the petitioners Pacifico and Schwartz, the Superior Court presumably properly assumed that the facts as to those organizations were such as would undeniably support those determinations.

Whitney v. Calif., 274 U. S. 357, 370, 371, 71 L. Ed. 1095, 1103, 1104;

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. Ed. 205, 210;

Barsky v. U. S., 167 F. 2d 241, 247 (cert. denied, 334 U. S. 843, 92 L. Ed. 1767);

Murdock v. Clark, 53 F. 2d 155;

National Maritime Union of America v. Herzog, 78 Fed. Supp. 146, 163 (affirmed 334 U. S. 854, 92 L. Ed. 1776);

Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323 (144 P. 2d 4);

Thompson v. Wallin, 95 N. Y. S. 2d 784, 792.

No doubt the Superior Court assumed and this Court may assume in this connection, that the Communist Party of the United States of America is and has always been, and that the Communist Political Association during its existence was at all times, an organization completely under the domination of a foreign power and effectively administered by such foreign power through its appointed agents within the United States, an organization created and administered for the prime purpose of overthrowing the constitutional government of the United States and setting up in its place a puppet government subservient to such foreign power, an organization dedicated to the effectuation of its purposes by any and every means, without regard either to their legality or humanity, or to their effect upon the welfare of the people of the United States, and an organization having as its prime credo the belief that fraud, deception, perjury, character assassination, sabotage, riot, terror and murder are not only justifiable but praiseworthy, if only they be directed toward the destruction of the United States.

Since one of the causes stated for the discharge of each of the petitioners was that he had failed and refused to execute an affidavit pursuant to the requirements of Section 4 of Ordinance No. 94,004, and since none of the petitioners came forward before the Civil Service Commission with any evidence of the irrelevancy of the

information required to be given in such an affidavit, or alleged any facts in his petition to the Superior Court from which that court might have concluded that such information was entirely irrelevant to the petitioner's public employment, or to his qualifications therefor, such cause for the discharge of each of the petitioners was conclusively determined by the order of the Board of Civil Service Commissioners. Consequently, the sole causes stated for the discharges of Pacifico and Schwartz are here beyond review (*Keokuk and H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. Ed. 299; *Citizens Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840), and even if the other cause stated for the discharge of each of the fifteen other petitioners were vulnerable, the discharge of each of them would still stand, under the invariable rule of this court.

B. No Substantial Federal Question Involved.

In the petition there is really no substantial argument made that an oath of loyalty may not be exacted as a condition to public employment, and Article VI, Section 3, and Section 3 of the Fourteenth Amendment, together with the following cases, is a sufficient answer to any such assertion:

Friedman v. Schwellenbach (1946), 159 F. 2d 22 (affirming 65 Fed. Supp. 254) (cert. denied 330 U. S. 838, 91 L. Ed. 1285);

United States v. Marzani (Dist. Col. D. C.), 71 Fed. Supp. 615, 620;

Board of Education v. Jewett, 21 Cal. App. 2d 64 (68 P. 2d 404);

L'Hommedieu v. Board of Regents, 276 App. Div. 494 (95 N. Y. S. 2d 443, 453);

Koral v. Board of Education (1950), 94 N. Y. S. 2d 378, 383;

Rabouine v. McNamara (1949), 275 App. Div. 1052 (92 N. Y. S. 2d 110).

Our Constitution is not a suicide pact; it was adopted to establish and preserve our government, not to serve as a protective screen and shield for those who seek to destroy it.

American Communications Ass'n v. Douds, 339 U. S. 382, 394, 94 L. Ed. 925, 941;

Hamilton v. University of California, 293 U. S. 245, 262, 79 L. Ed. 343, 353;

Whitney v. California, 274 U. S. 357, 371, 71 L. Ed. 1095, 1104;

Gitlow v. New York, 268 U. S. 652, 668, 69 L. Ed. 1138, 1147;

United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 414, 65 L. Ed. 704, 710;

Barsky v. U. S., 83 U. S. App. D. C. 127, 167 F. 2d 241, 246 (cert. denied, 334 U. S. 843, 92 L. Ed. 1767);

National Maritime Union of America v. Herzog (D. C. Dist. Col.), 78 Fed. Supp. 146, 170 (affirmed, 334 U. S. 854, 92 L. Ed. 1776);

L'Hommedieu v. Board of Regents (1950), 95 N. Y. S. 2d 443, 457.

1. The People of a City May Require That Their Servants Have Been Loyal to the Constitutional Government of the United States and the State During the Five-year Past Period.

There is left then for discussion, at the most, only the narrow question of whether or not it is a sufficient cause for his discharge that a city employee failed to comply with a requirement by the people of the city that he affirm his loyalty during the five-year preceding period. (The petitioners concede, at pages 12, 16 and 17 of their petition, that *demonstration* of their disloyalty during such period would justify discharge.) (Since the petitioners Pacifico and Schwartz are not concerned here, our references to the petitioners hereafter will exclude those two.)

The petitioners' attack on this line is that such requirement is forbidden, as being both a bill of attainder and an *ex post facto* law.

The assertion is valid in neither of these regards, and its invalidity does not depend merely upon a matter of definition in either case, although definitions alone would be sufficient answers. (A bill of attainder is a legislative determination of the guilt of named or identifiable individuals or organizations with a *concomitant* imposition of punishment (*Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366), while an *ex post facto* law is a definition of an act as criminal, after the commission of such act, with a concomitant provision for penal sanctions (*Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; *Watson v. Mercer*, 8 Pet. 88, 8 L. Ed. 876; *L'Hommedieu v. Board of Regents*, 95 N. Y. S. 2d 443). Ordinance No. 94,004 answers neither definition).

Neither does the language of any of the opinions, or the effect of the decision, in *American Communications Association v. Douds*, 339 U. S. 383, 94 L. Ed. 925, support the petitioners' contention. There Section 9(h) of the National Labor Relations Act, requiring that officers of a labor organization file non-Communist affidavits before the organization might enjoy the privileges of the Act, was upheld. The claim was made that First Amendment liberties were involved and that the act constituted a bill of attainder. At page 390 (L. Ed. 939), the prevailing opinion states:

> "We think it is clear in addition that the remedy provided by Section 9(h) bears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership, * * * and that many persons who believe in overthrow of the government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy."

(Compare the affidavit provisions of Ordinance 94,004 [Secs. 3 and 4, R. 12], which do not require the employee to state that he is *not* a member of the Communist Party.)

As to the bill of attainder argument, the opinion says in part, at page 414 (L. Ed. 952):

> "Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder."

The petitioners seize upon part of this language to support their contention that Ordinance 94,004 constitutes a bill of attainder and they say, significantly,

> "Under the terms of the Ordinance here, no 'voluntary alteration of loyalties' can possibly make the petitioners here eligible to take the oath or execute the affidavit." (Petition, p. 14.)

Were the case presented here that of one who had come forward at the time he was asked to take the oath, with an asseveration that he had indeed four years previously and prior to his city employment, been a member of a subversive organization, but that he had then repented and recanted and that he wished to continue to dedicate his life to the public service, a more appealing case would appear to have been presented to the Civil Service Commission, although the lack of jurisdiction in the state court and in this Court would still have been evident. However, none of the petitioners presented such a case. Instead, as indicated by their above quoted statement, each of them was saying to the Civil Service Commission, *in effect:*

> "I could not truthfully execute the affidavit required of me, because I am or have recently been a member of the Communist Party of the United States of America or a member of the Communist Political Association, and each of these organizations is a criminal conspiracy. Evidence of my membership consequently would lead to my prosecution under the Smith Act (Title 18, U. S. C., §2385), and under the California Syndicalism and Sabotage Law.
>
> "I could not truthfully take the oath required of me, and in view of the facts as to the Communist Party and the Communist Political Association, if

I nevertheless had taken the oath I would have subjected myself to prosecution for perjury.

"Nevertheless, I ask that you set aside my discharge, and I assert that as a matter of law you must set it aside."

Thus analyzed, it becomes all the more clear that there was no basis whatever in the petitioners' application that the Superior Court set aside the determination of the Civil Service Commission that the failure of each of the petitioners to execute the required oath was a sufficient cause for his discharge. Assuming nevertheless that such an inquiry is open here, the determination of the Civil Service Commission and of the Superior Court as to the sufficiency of that stated cause is completely invulnerable.

2. Such a Requirement Is One of Qualification Merely.

The exaction demanded by the oath so far as its retrospective provisions are concerned, is simply a statement of qualifications for positions of public trust and not in any sense a penal ordinance. Quite apart from the support given these portions of the oath by Section 432 of the Charter, they amount merely to this: that the people of the City are not content merely to review the present self-asserted present loyalties of their employees, but insist as well that their employees assert a five-year record of innocence of overt sedition or conspiracy.

This type of protective insurance is not unusual even in matters relating to the licensing of lawyers and others who seek to enjoy special privileges affected with the public interest (see *Cohen v. Wright*, 22 Cal. 293; *State v. Garesche*, 36 Mo. 256; *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210; *Blair v. Ridgely*,

41 Mo. 63; *State ex rel Wingate v. Woodson,* 41 Mo. 227; *Martin v. The Law Society* (British Columbia Court of Appeals), 8 The Advocate, 105, Vol. I, Western Weekly Reports, 1949, p. 993), and is common in matters relating to public employment. Few, if any, governmental entities complete appointments to the public service without rather searching inquiries as to the applicant's history as to criminal offenses, personal sobriety and good conduct, and it is common experience that applications for public employment are frequently rejected because of evidence or even sound suspicion that the applicant has been defiant of the law, addicted to drink, or disposed to unconventional conduct. (See *Crampton v. O'Mara,* 193 Ind. 551, 139 N. E. 360 [writ of error dismissed, 267 U. S. 575, 69 L. Ed. 795].) Obviously, in such cases the relevancy of those past matters consist in the assumption that evidence of past conduct supports valid conclusions as to present character and that unreliable character prophesies harmful future conduct.

In evidence of past misdemeanors, despite the applicant's vigorous protestations that he will observe police ordinances in the future, can validly support a refusal to appoint to a public position or a discharge from a public position, can there be any doubt of the propriety of a requirement that public servants must have been at least passively loyal for a five-year past period? Each of the retrospective statements of the oath here involves conduct defined as felonious by both federal and state law, and even if that were not the case the interest of the people in such past conduct by their servants would be inescapably required for the protection of the people's government.

II.

There Is No Conflict Between the Judgment Below and Any Decision of This Court.

There is no conflict between the judgment below and any decision of this Court, nor is there any conflict between the opinion of the District Court of Appeal and any decision of this Court.

The petitioners seek to spell out a conflict between a part of the prevailing opinion in *American Communications Association v. Douds*, 339 U. S. 382, 94 L. Ed. 925, and the judgment below. There is no conflict here with the result there. As the Court said there (339 U. S. at 392, 94 L. Ed. at 940):

> "If no more were involved than possible loss of position, the foregoing would dispose of the case."

Nor is there any conflict of language, as we have previously pointed out.

Neither is there any conflict between the decision here and the decisions in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, and *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356. The ordinance here was narrowly drawn to touch only fundamental loyalties to the existing constitutional government and threatens no social, economic or political belief whatever. In *Cummings* and *Garland*, on the other hand, no question was involved of the power or right of the states to examine the fundamental loyalties of their own servants. And as this Court pointed out in *Hawker v. People of the State of New York*, 170 U. S. 189, 198-200, 42 L. Ed. 1002, 1006-1007, since

many of the matters contained in the oaths there were entirely irrelevant to the qualifications of the parties to perform the duties of a Catholic priest and of a lawyer, the oaths had to be considered in the nature of penalties for past offenses rather than as legitimate tests of qualifications.

As this Court said in the *Douds* case at page 413 (94 L. Ed. 952), with respect to the rule of the *Garland* and *Cummings* cases:

> "* * * there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that . . . (the statute) is intended to prevent future action rather than to punish past action."

Conclusion.

There is here no police action, no censorship, no coercion, no condemnation without a hearing. There is only an inquiry by a city of its employees about matters which were not shown to be irrelevant, and which this Court knows *are* relevant, followed by discharges after full and fair hearings for refusals to answer such inquiries.

It is respectfully submitted that no cause for review appears.

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APPENDIX "A."

SECTION 80 OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1925, page 1058)

"Subject to the provisions of this charter, the rules of the department and the instruction of his board, said general manager shall have the power and duty:

(1) To administer the affairs of the department as its chief administrative officer;

(2) To appoint, discharge, suspend, or transfer the employees of the department, * * *, and to issue instructions to said employees, * * * in the line of their duties, all subject to the Civil Service provisions of the charter;

* * * * * * * * *

APPENDIX "B."

SECTION 112(a) OF THE CHARTER OF THE CITY OF LOS ANGELES.

(Statutes of California 1945, page 3402)

"Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing,

that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

APPENDIX "C."

An act to add Chapter 8 to Division 4, Title 1, of the Government Code, relating to an oath or affirmation of allegiance for civil defense workers and public employees, declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SECTION 1. Chapter 8 is added to Division 4, Title 1 of the Government Code, to read:

CHAPTER 8. OATH OR AFFIRMATION OF ALLEGIANCE FOR CIVIL DEFENSE WORKERS AND PUBLIC EMPLOYEES.

3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in profection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term "civil defense worker" includes all public employees and all volunteers in any civilian defense organization accredited by the State Disaster Council. The term "public employees" includes all persons employed by the State or any county, city, city and county, state agency or public district, excluding aliens legally employed.

3102. Subject to the provisions of Section 3 of Article XX of the Constitution, all civil defense workers shall

within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter.

3103. The oath or affirmation required by this chapter is as follows:

"I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words, 'No Exceptions')

and that during such time as I am a member or employee of the.....I will not advocate nor be-

(name of public agency)

come a member of any party or organization, political or otherwise, that advocates the overthrow of the Govern-

ment of the United States or of the State of California by force or violence or other unlawful means."

3104. The oath or affirmation may be taken before any officer authorized to administer oaths.

No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

3105. The oath or affirmation of any civil defense worker of the State shall be filed with the State Personnel Board within 30 days of the date on which it is taken and subscribed.

The oath or affirmation of any civil defense worker of any county shall be filed in the office of the county clerk of the county.

The oath or affirmation of any civil defense worker of any city shall be filed in the office of the city clerk of the city.

The oath or affirmation of any civil defense worker of any other agency or district shall be filed with such officer or employee of the agency or district as may be designated by such agency or district.

3106. Compliance with this chapter shall, as to state employees, be deemed full compliance with Chapter 4, Part 1, Division 5, Title 2 of this code, requiring taking of oaths by state employees.

3107. No compensation nor reimbursement for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that such civil defense worker has taken such oath or affirmation.

3108. Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

3109. Every person having taken and subscribed to the oath or affirmation required by this chapter, who while in the employ of, or service with, the State or any county, city, city and county, state agency, public district, or civilian defense organization advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States by force or violence or other unlawful means, is guilty of a felony, and is punishable by imprisonment in the state prison not less than one or more than 14 years.

SEC. 2. Subject to the provisions of Section 3 of Article XX of the Constitution, all persons designated in Chapter 8, Division 4, Title 1, of the Government Code as civil defense workers, on the effective date of this act shall, within 30 days, take and subscribe to the oath or affirmation required by Chapter 8, Division 4, Title 1, of the Government Code. Any public employee who is on authorized leave on the thirtieth day after the effective date of this act shall take and subscribe said oath or affirmation within 30 days of his return to work.

SEC. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 4. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

During the present emergency in world affairs loyalty and allegiance to the United States and the principles for which it stands are of utmost importance. Immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of its overthrow by force or violence is essential to the well-being of the State and Nation and the confidence of the people. It is therefore necessary that this act take effect immediately.

APPENDIX "D."

ACT 8428. CALIFORNIA SYNDICALISM AND SABOTAGE LAW.

(Statutes of California 1919, page 281)

"An act defining criminal syndicalism and sabotage, prescribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

"Section 1. *'Criminal syndicalism' defined.* The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. *Unlawful acts: Penalty.* Any person who:

1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

"Sec. 3. *Constitutionality of act.* If for any reason any section, clause or provision of this act shall by any court be held unconstitutional then the legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

"Sec. 4. *Urgency clause.* Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor."

APPENDIX "E."

TITLE 5 OF THE CORPORATIONS CODE OF THE STATE OF CALIFORNIA.

"Subversive Organization Registration Law."

"Sec. 35000. *Short title.* This title may be cited as the Subversive Organization Registration Law.

"Sec. 35001. *Purpose of title.* This title is enacted in the exercise of the police power of this State for the protection of the public peace and safety by requiring the registration of subversive organizations which are conceived and exist for the purpose of undermining and eventually destroying the democratic form of government in this State and in the United States.

"Sec. 35002. *'Subversive organization' defined.* As used in this title, 'subversive organization' means every corporation, association, society, camp, group, bund, political party, assembly, and every body or organization composed of two or more persons or members, which comes within either or both of the following descriptions:

"(a) Which directly or indirectly advocates, advises, teaches, or practices, the duty, necessity, or propriety of controlling, conducting, seizing, or overthrowing the Government of the United States, of this State, or of any political subdivision thereof by force or violence.

"(b) Which is subject to foreign control as defined in Section 35003.

* * * * * * * * *

"Sec. 35100. *Information and documents to be filed.* Every subversive organization in existence on September 13, 1941, shall within 30 days after that date, and every

subversive organization thereafter organized shall within 10 days after its organization, file with the Secretary of State, on such forms and in such detail as he may prescribe, the following information and documents:

"(a) A complete and detailed statement subscribed, under oath, by all of its officers, showing all of the following:

"(1) Its name and post-office address.

"(2) The names and addresses of all its branches, chapters, and affiliates.

"(3) The names, nationalities, and residence addresses of its officers and members, and the qualifications required for membership in it.

"(4) The nature and extent of its existing and proposed aims, purposes, and activities.

"(5) The times and places of its meetings.

* * * * * * * * *

"(b) A true copy, certified by all of its officers, of all of the following:

"(1) Its charter, articles of association, or constitution, and its by-laws, rules and regulations.

"(2) Its oath, affirmation, or pledge of membership, if any.

"(3) Each agreement, resolution, and other instrument or document relating to its organization, powers, and purposes and the powers and duties of its officers and members.

"(4) Each book, pamphlet, leaflet, or other printed, written, or illustrated matter directly or indirectly issued

or distributed by it or in its behalf, or to or by its members with its knowledge, consent, or approval.

* * * * * * * * *

"(c) A description of the uniforms, badges, insignia, or other means of identification prescribed by it, and worn or carried by its officers or members, or any of such officers or members.

"(d) In case it is subject to foreign control, a statement of the manner in which it is so subject.

* * * * * * * * *

"Sec. 35103. *Statement of new members.* Every subversive organization shall at least once in each period of six months file with the Secretary of State a statement subscribed under oath by all of its officers showing the names and residence addresses of all persons who have been admitted to membership during that period or, if no members have been admitted during that period, a statement to that effect similarly subscribed.

* * * * * * * * *

"Sec. 35302. *Membership in and attending meeting of organization.* Any person who becomes or remains a member of any subversive organization, or attends a meeting thereof, with knowledge that the organization has failed to comply with any provision of this title, is guilty of a misdemeanor punishable by fine of not less than ten dollars ($10) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not less than 10 days nor more than one year, or by both."

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1951.

2-13-51—60